7560, 7561

Nos. 82-1913 & 82-1951

Supreme Court, U.S.
FILED
NOV 28 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOE G. GARCIA,
Appellant,
v.
SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,
Appellees.

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
Appellant,
v.
SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,
Appellees.

On Appeal from the United States District Court for the Western District of Texas

---

BRIEF OF APPELLANT JOE G. GARCIA

3300

EARLE PUTNAM
5025 Wisconsin Ave., N.W.
Washington, D.C. 20016

LINDA R. HIRSHMAN
201 N. Wells Street
Chicago, Illinois 60606

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20036
(202) 637-5390
Counsel of Record

Of Counsel:

DAVID M. SILBERMAN
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

QUESTION PRESENTED

May the minimum wage and overtime provisions of the Fair Labor Standards Act constitutionally be applied to employees of a publicly owned and operated mass transit system?*

---

* The parties to this action are Joe G. Garcia and Raymond J. Donovan, Secretary of Labor of the United States, plaintiffs in the court below and the San Antonio Metropolitan Transit Authority, and the American Public Transit Association, defendants in the court below.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
I. The Factual Background	3
II. The Proceedings In This Case	4
SUMMARY OF ARGUMENT	6
ARGUMENT	9
THE TENTH AMENDMENT DOES NOT PRECLUDE CONGRESS FROM REQUIRING STATE-OWNED TRANSIT SYSTEMS TO COMPLY WITH THE PROVISIONS OF THE FAIR LABOR STANDARDS ACT	9
CONCLUSION	25
APPENDIX	1a

TABLE OF AUTHORITIES

CASES Page

Alewine v. City Council, 699 F.2d 1060 (C.A. 11 1983) 21
Bell v. New Jersey, —— U.S. ——, 51 L.W. 4647 (1983) 18
Bonnette v. California Health and Welfare Agency, 704 F.2d 1465 (C.A. 9, 1983) 21-22
Bus Employees v. Missouri, 374 U.S. 74 (1963) 19
Bus Employees v. Wisconsin Board, 340 U.S. 383 (1951) 19
Chicago, R.I. & P.R. Co. v. Arkansas, 219 U.S. 453 16
Coyle v. Oklahoma, 221 U.S. 559 (1911) 11, 22
Donovan v. Richard County Assn., 454 U.S. 389 (1982) 2
Dove v. Chattanooga Area Reg. Transp. Auth., 704 F.2d 50 (C.A. 6 1983) 7, 21
EEOC v. Wyoming, —— U.S. ——, 51 L.W. 4219 (1983) 9, 10, 11, 22
Engineers v. Chicago, R.I. & P.R. Co., 382 U.S. 423 (1966) 16
FERC v. Mississippi, 456 U.S. 742 (1982) 9, 10, 23
Helvering v. Powers, 293 U.S. 214 (1934) 15
Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) ..... *passim*
Jackson Transit Authority v. Transit Union, 457 U.S. 15 (1982) 17, 18
Kramer v. New Castle Transit Authority, 677 F.2d 308 (C.A. 3 1982), *cert. denied*, —— U.S. ——, 51 L.W. 3533 (Jan. 17, 1983) 20
N.Y., N.H. & H. Railroad v. New York, 165 U.S. 628 (1896) 16
Nashville, Etc. Railway v. Alabama, 128 U.S. 96 (1888) 16
National League of Cities v. Usery, 426 U.S. 833 (1976) ..... *passim*
Smith v. Alabama, 121 U.S. 465 (1887) 16
Texas v. White, 7 Wall 700 (1869) 22
Transportation Union v. Long Island R. Co., 455 U.S. 678 (1982) ..... *passim*

STATUTES Page

Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§ 201 *et seq.* ..... *passim*
Urban Mass Transit Act of 1964, 49 U.S.C. §§ 1601 et seq. 3, 17-18, 20
U.S. Constitution
Article I, § 8 ..... *passim*
Tenth Amendment ..... *passim*

MISCELLANEOUS

American Public Transit Association, 1978-79 *Transit Fact Book* 16
American Public Transit Association, *1981 Transit Fact Book* 15, 16, 19
American Ass'n of State Highway and Transportation Officials, *Survey of State Involvement in Public Transportation* (1982) 18
Department of Transportation, *UMTA Statistical Profile* (1976) 18
Hearings Before the Subcommittee on the Department of Transportation and Related Agencies Appropriations Subcommittee of the House Committee on Appropriations, 97th Cong., 2d Sess. 18
C. Krouse, "Existing Revenue Sources" *in* American Society of Civil Engineers, *Proceedings of the Specialty Conference on Urban Transportation Financing* (1979) 15
H.R. Rep. No. 204, 88th Cong. 1st Sess. (1963) 17
S. Rep. No. 82, 86th Cong. 1st Sess. (1963) 17
S. Rep. No. 1487, 89th Cong. 2d Sess. (1966) 19
U.S. Dept. of Commerce, *Historical Statistics of the United States from Colonial Times to 1970* (1976) 24
U.S. Dept. of Commerce, *Statistical Abstract of the United States, 1982-1983* 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

Nos. 82-1913 & 82-1951

JOE G. GARCIA,

Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,

Appellees.

RAYMOND J. DONOVAN, SECRETARY OF LABOR,

Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,

Appellees.

On Appeal from the United States District Court for the Western District of Texas

---

BRIEF OF APPELLANT JOE G. GARCIA

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Texas is reported at 557 F. Supp. 445 and is reproduced in the Appendix to Appellant Garcia's Jurisdiction Statement in No. 82-1913 (hereafter "J.S.") at pp. 1a-18a. The prior judgment of the District Court, reproduced at J.S. 23a-24a, is not officially reported, but appears at 25 Wage and Hour Cases (BNA) 274.

JURISDICTION

This is a declaratory judgment action instituted by the appellee, San Antonio Metropolitan Transit Authority ("SAMTA"), against the Secretary of Labor, alleging that the minimum wage and overtime provisions of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§ 201 *et seq.* ("FLSA"), may not, by virtue of the Tenth Amendment, constitutionally be enforced against SAMTA. Subject matter jurisdiction is founded on 28 U.S.C. §§ 1331 & 1337.

The judgment of the District Court declaring that the Secretary of Labor may not constitutionally apply or seek to enforce the FLSA against SAMTA or any other local public mass transit system has an effective date of February 14, 1983 and was entered on February 18, 1983. (J.S. 19a-21a.) Appellant Garcia filed a notice of appeal on March 16, 1983. (J.S. 22a.) On April 25, 1983, Justice White entered an order extending the time for filing a Jurisdictional Statement to and including June 1, 1983. On that date Appellant Garcia filed a Jurisdictional Statement invoking the jurisdiction of this Court under 28 U.S.C. § 1252. (*See, e.g., Donovan v. Richland County Assn.*, 454 U.S. 389 (1982).) On October 3, 1983, this Court noted probable jurisdiction in this appeal and in an appeal by the Secretary of Labor from the same judgment (No. 82-1951), and consolidated the cases (—— U.S. ——, 52 L.W. 3261.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves: Article I, § 8 of, and the Tenth Amendment to, the Constitution of the United States; and the Fair Labor Standards Act. These constitutional and statutory provisions are reproduced in pertinent part in an appendix to this brief.

STATEMENT OF THE CASE

I. The Factual Background

Prior to May 1, 1959 mass transit service in San Antonio was provided by the San Antonio Transit Company ("SATC"). On May 1, 1959 the City of San Antonio created the San Antonio Transit System ("SATS") and bought SATC. Appellee San Antonio Metropolitan Transit Authority ("SAMTA") became the successor to SATS on March 1, 1978.[1]

During its first decade of operations, SATS was a money-making venture whose operations were governed by the terms of a revenue bondholders' indenture.[2] In 1969, however, the system experienced an operating loss for the first time in its history as F. Norman Hill, general manager of SATS, advised the Subcommittee on Housing of the House Committee on Banking and Currency on March 10, 1970.[3]

---

[1] SAMTA is a regional transit authority created pursuant to Tex. Rev. Civ. Stat. Ann. Art. 1118x (Vernon Cum. Supp. 1981) to serve the San Antonio metropolitan area. The City Council of San Antonio created VIA Metropolitan Transit to carry out SAMTA's business. VIA purchased the facilities and equipment of SATS from the City of San Antonio as of March 1, 1978 and commenced operations on that date.

[2] The National Bank of Commerce of San Antonio, acting as the bondholders' trustee, was the depository for all of SATS' revenues and would release monthly operating funds to the System in accordance with an annual budget. As of March 1, 1978, when SAMTA assumed transit operations, the bonds were paid in full.

[3] Mr. Hill, was speaking on behalf of the American Transit Association in support of H.R. 1626. That bill (*see* 116 Cong. Rec. 5785 (1970)) was one of several introduced that session "to provide long-term financing for expanded urban mass transportation programs, and for other purposes." Compare the preamble to the Urban Mass Transportation Act of 1970, P.L. 91-453, which, in part, amended the Urban Mass Transportation Act of 1964, P.L. 88-365, 49 U.S.C. §§ 1601 *et seq.* The significance of that Act for this case is discussed at pp. 17-18, 20-21, *infra*.

Later that year SATS received a capital grant from the Urban Mass Transit Administration in the amount of $4,122,666.[4] Over the next 10 years SATS and its successor, SAMTA, received $51,689,000 in federal capital and operational grants.

II. The Proceedings In This Case

In 1979, in response to a specific inquiry about the applicability of the FLSA to employees of SAMTA, the Wage and Hour Administration of the Department of Labor rendered an opinion "that the operations of the San Antonio Transit System are not constitutionally immune from the application of the Fair Labor Standards Act." (Opinion WII-499, dated September 17, 1979, reprinted in Wage Hour Manual (BNA) 91: 1138-1140.) (*See also* § 775.3(b) of the FLSA regulations (Code of Federal Regulations, Title 29, Part 775), which includes "local mass transit systems" in a list of "functions of a State or its political subdivision [that] are not traditional" (44 Fed. Reg. 75628).)

On November 21, 1979, SAMTA filed this action for a declaratory judgment against the Secretary of Labor seeking a determination that SAMTA is exempt from the provisions of the FLSA.[5] SAMTA moved for summary judgment asserting that under *National League of Cities v. Usery*, 426 U.S. 833 (1976), the FLSA "cannot be constitutionally applied to it." Alternatively, SAMTA argued that the *National League of Cities* decision precludes enforcement of the FLSA against any state or

---

[4] Project No. TX03005, approved December 23, 1970.

[5] On that same date appellant Joe G. Garcia, and fellow employees, instituted an action in the district court against SAMTA for overtime pay under the FLSA. (*Garcia v. SAMTA*, SA 79 CA 458.) That suit was stayed pending disposition of the constitutional challenge herein. Garcia was thereafter granted leave to intervene as a defendant in this suit and the American Public Transit Association was permitted to intervene as a plaintiff.

local governmental body in the absence of a congressional reenactment of a constitutionally valid amendment to that Act. The Secretary of Labor thereafter filed a motion for partial summary judgment.

On November 17, 1981, the District Court granted SAMTA's motion for summary judgment, finding that "local public mass transit systems (including San Antonio Metropolitan Transit Authority) constitute integral operations in areas of traditional functions . . . and that the Secretary of Labor of the United States cannot apply or seek to enforce the minimum wage and overtime pay provisions of the Fair Labor Standards Act. . . ." (J.S. 24a.) Consequently, the Department of Labor's classification of a public mass transit system as not constitutionally immune from application of the FLSA (29 CFR § 753(b)(3)) was held to be "null and void." (J.S. 24a.) On January 19, 1982, the District Court stayed, pending an appeal, the portion of its judgment enjoining the Secretary of Labor from applying or seeking to enforce the FLSA against all public mass transit systems in the nation.

Garcia and the Secretary of Labor each appealed to this Court (Nos. 81-1728 and 81-1735). On June 7, 1982, this Court entered an order (457 U.S. 1102) vacating the judgment of the District Court and remanding the case for further consideration in light of *Transportation Union v. Long Island R. Co.*, 455 U.S. 678 (1982).

On remand, the District Court, after receiving briefs from the parties, reaffirmed its original decision and reentered summary judgment in favor of SAMTA and the American Public Transit Association. (J.S. 1a-18a.)

SUMMARY OF ARGUMENT

The question in this case is whether the Tenth Amendment precludes Congress from requiring state-owned transit systems to comply with the provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* ("FLSA"). The answer to that question depends on "whether the federal regulation affects basic state prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its 'separate and independent existence.'" *Transportation Union v. Long Island R. Co.*, 455 U.S. 678, 686-87 (1982) ("*UTU*"). *See* pp. 9-11, *infra*.

In *UTU*, this Court answered that question in the negative with respect to federal regulation (through the Railway Labor Act) of the employment relationships of a state-owned railroad. The three factors that led the Court to that conclusion in *UTU*, *see* 455 U.S. at 685-90, are equally applicable here. First, the operation of a transit system is a "business enterprise." Second, it is a type of business enterprise that "has traditionally been a function of private industry, not state or local governments." And third, the States entered the mass transit field "with full awareness that it was subject to federal regulation" and have "operated under federal regulation for . . . years without claiming any impairment of [their] traditional sovereignty." Thus, here, as in *UTU*, it cannot be said that application of the FLSA to public transit systems will threaten the "separate and independent existence" of the States. *See* pp. 11-12, 14-19, *infra*.

Indeed, in these circumstances to hold that the States are immune from federal regulatory authority would create a powerful incentive for transferring business enterprises from private to public ownership. When transit systems were privately owned and operated those businesses, like all private businesses engaged in interstate

commerce, were subject to federal regulation, including, *e.g.*, the provisions of federal labor law. Those regulations generally impose costs on the operation of private businesses in the interest of achieving other social objectives. If those costs could be avoided by state acquisition of the business it would become economically advantageous, at least in the short run, for the States to acquire and operate private businesses. Yet plainly it was not the intent of the Tenth Amendment to foster a state takeover of the provision of goods and services. *See* pp. 18, 19-20, *infra*.

There is one additional factor here that makes it especially inappropriate to allow the States' entry into the transit field to defeat federal regulatory authority: the role the federal government has played in promoting that entry. Pursuant to the Urban Mass Transit Act of 1964, 49 U.S.C. §§ 1601 *et seq.* ("UMTA") the federal government has spent over $18,000,000,000 in financing state acquisition of mass transit systems as well as contributing heavily towards the capital and operating expenses of such systems. Thus, public transit systems are cooperative efforts of the federal government and the States. And, as the Sixth Circuit has stated, "[i]t would indeed be peculiar to hold that federal aid for transit created a situation where a state which provides transit service is immune from federal labor regulations." *Dove v. Chattanooga Area Reg. Transp. Auth.*, 701 F.2d 50, 53 (6th Cir. 1983). *See* pp. 20-21, *infra*.

Finally, the conclusion that federal regulation here will not threaten the "separate and independent existence" of the States accords with the constitutional values at stake. There is a tension between the value underlying the Supremacy Clause—which is protective of federal sovereignty—and the value underlying the Tenth Amendment—which is protective of state sovereignty. The ac-

commodation required by *National League of Cities* and its progeny is to limit federal authority *only* to the extent necessary to preserve the essence of state sovereignty.

State sovereignty is most directly expressed in the State's law-making and law-enforcement powers, not in the State's provision of particular goods and services. Indeed, a State's decision to undertake a particular service—including transit services—ordinarily reflects the play of economic forces which can and do vary from time to time and from place to place. For this reason, it is appropriate to approach with great skepticism any claim that State sovereignty will be compromised by federal regulation of a state-provided service. And where, as in *UTU* and as in this case, the service traditionally has been regarded as a business, performed predominantly by private enterprise, and regulated by the federal government, that activity—when performed by a State—is not an "essential[] of state sovereignty" and is not one to which federal sovereignty must yield. *See* pp. 22-25, *infra*.

ARGUMENT

THE TENTH AMENDMENT DOES NOT PRECLUDE CONGRESS FROM REQUIRING STATE-OWNED TRANSIT SYSTEMS TO COMPLY WITH THE PROVISIONS OF THE FAIR LABOR STANDARDS ACT.

A. The question in this case is whether the Tenth Amendment precludes Congress from requiring state-owned transit systems to comply with the provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* ("FLSA"). That question is to be answered by applying the "three-prong test" that this Court has developed for "evaluating claims under *National League of Cities* [*v. Usery*, 426 U.S. 833 (1976)]." *Transportation Union v. Long Island R. Co.*, 455 U.S. 678, 684 (1982) (hereinafter "*UTU*"):

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged regulation regulates the "States as States." Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions." [*Hodel v. Virginia Surface Mining & Recl. Ass'n*, 452 U.S. 264, 287-88 (1981) (emphasis in original) (hereinafter "*Hodel*"), *quoted in UTU*, 455 U.S. at 684. *See also FERC v. Mississippi*, 456 U.S. 742, 763-64 n.28 (1982); *EEOC v. Wyoming*, —— U.S. ——, 51 L.W. 4219, 4222 (March 2, 1983)] [6]

---

[6] Moreover, the *Hodel* Court added:

> Demonstrating that these three requirements are met does not, however, guarantee that a Tenth Amendment challenge to congressional commerce clause action will succeed. There are situations in which the nature of the federal interest advanced

There is no dispute that insofar as it applies to public single-state transit authorities, the FLSA "regulates the 'States as States.'" Furthermore, *National League of Cities* establishes that the fixing of wages and hours for public employees is "indisputably [an] 'attribute[] of state sovereignty.'" Thus, this case turns on the third inquiry *Hodel* directs: whether it is apparent that federal regulation of the wages and hours of public transit employees "would directly impair th[e States'] ability 'to structure integral operations in areas of traditional governmental functions.'"

By its terms the third *Hodel* factor requires that a line be drawn between "integral operations in areas of traditional governmental functions" and other state operations. The Court has had only one occasion to begin the process of drawing that line—the *UTU* case for which the instant case was remanded for reconsideration. We thus begin our analysis by reviewing that decision's rationale.

B. The question in *UTU* was "whether the Tenth Amendment prohibits application of the Railway Labor Act to a state-owned railroad engaged in interstate commerce." 455 U.S. at 680. That Act provides railroad employees with extensive protections in their dealings with their employers, and places corresponding limitations on the scope of managerial authority to determine unilaterally the terms and conditions of employment for railroad employees—limitations far greater than those imposed by the FLSA whose application had been at issue in *National League of Cities* (and is at issue here). Yet notwithstanding that fact, the Court in *UTU* held that Congress is constitutionally permitted to apply the Railway Labor Act to state-owned railroads. In reaching that conclusion the Court reasoned as follows.

---

may be such that it justifies state submission. [*Hodel*, 452 U.S. at 288 n.29; *see also UTU*, 455 U.S. at 684 n.9; *FERC v. Mississippi*, *supra*, 456 U.S. at 763-64 n.28; *EEOC v. Wyoming*, *supra*, 51 L.W. at 4222.]

The Court began by explaining that the concern underlying *National League of Cities* is that "federal power to regulate commerce . . . not be exercised in such a manner as to undermine the role of the states in our federal system." 455 U.S. at 686. Given that concern, *UTU* concluded that *Hodel's* focus on "integral operations in areas of traditional governmental functions" is to be understood "to require an inquiry into whether the federal regulation affects basic state prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its 'separate and independent existence.'" 455 U.S. at 686-87, *quoting National League of Cities*, 426 U.S. at 851. Only where the federal regulation would have such an effect is the third prong of the *Hodel* test met and does the Tenth Amendment preclude federal regulation.[7]

In concluding in *UTU* that the test is *not* satisfied with respect to state-owned railroads the Court pointed to three factors. First, the Court noted that in operating a railroad the State is engaged in "the running of a business enterprise":

> The *National League of Cities* opinion focused its delineation of the "attributes of sovereignty" . . . on a determination as to whether the State's interest involved "functions essential to separate and independent existence." [426 U.S. at 845] *quoting Coyle v. Oklahoma*, 221 U.S. 559, 580 (1911). It should be evident . . . that the running of a business enterprise is not an integral operation in the

---

[7] *See also EEOC v. Wyoming, supra*, 51 L.W. at 4222 (citations omitted):

> The principle of immunity articulated in *National League of Cities* is a functional doctrine . . . whose ultimate purpose is not to create a sacred province of state autonomy, but to ensure that the unique benefits of a federal system in which the States enjoy a "separate and independent existence," not be lost through undue federal interference in certain core state functions.

> area of traditional government functions. [455 U.S. at 685 n.11, *quoting Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 422-24 (Burger, C.J. concurring)]

Second, the Court emphasized that the "operation of passenger railroads" is not just a business enterprise but one that "has traditionally been a function of private industry, not state or local governments." 455 U.S. at 686. The Court recognized that "some passenger railroads have come under state control in recent years," *id.*, but the Court viewed that fact as irrelevant because it

> does not alter the historical reality that the operation of railroads is not among the functions *traditionally* performed by state and local governments. Federal regulation of state-owned railroads simply does not impair a state's ability to function as a state. [*Id.*; emphasis in original]

Finally, the *UTU* Court stressed the long history of "comprehensive federal regulation of the [railroad] industry." 455 U.S. at 687. The Court noted that "[h]ere the State acquired the Railroad with full awareness that it was subject to federal regulation under the Railway Labor Act" and the State "operated under federal regulation for 13 years without claiming any impairment of its traditional sovereignty." *Id.* at 690. Given these facts the Court concluded:

> It can thus hardly be maintained that application of the Act to the State's operation of the Railroad is likely to impair the State's ability to fulfill its role in the Union or to endanger the "separate and independent existence" referred to in *National League of Cities v. Usery*, 426 U.S., at 851. [455 U.S. at 690]

It would appear—although *UTU* does not address the issue in terms—that each of the three factors the Court looked to is of independent significance in determining whether federal regulation "would be likely to hamper the state government's ability to fulfill its role in the

Union and endanger its 'separate and independent existence'." 455 U.S. at 686. For the States' existence is unlikely to be threatened where the federal government regulates a state-owned "business enterprise" *or* where the federal regulation is of an activity that traditionally has been performed by the private sector *or* where the federal regulation of that activity is long-standing. In *UTU*, however, all three factors were present. And where that is true, there is an especially powerful reason, suggested in *UTU*, for sustaining the federal regulation.

If a State, by acquiring a private business enterprise were, by virtue of the Tenth Amendment, to gain an immunity from established federal regulatory authority, the Tenth Amendment would create a powerful incentive for transferring business enterprises from private to public ownership. Federal regulation, in the interest of other social objectives, normally imposes costs on the operation of a business, as the instant case and *UTU* both illustrate. If those costs could be avoided by state acquisition of the business, it would become economically advantageous at least in the short run for the States to acquire (using eminent domain powers if necessary) and operate business enterprises free of the federally-imposed costs. Yet plainly, the Tenth Amendment was not intended to encourage a state take-over from the private sector of the provision of goods and services. Thus, as the Court concluded in *UTU*:

> Just as the Federal Government cannot usurp traditional state functions, there is no justification for a rule which would allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in areas traditionally subject to federal statutory regulation. [455 U.S. at 687]

C. The instant case cannot be meaningfully distinguished from *UTU*. For as we proceed to show, state-owned mass transit systems—like state-owned railroads—

are business enterprises that have been traditionally operated by private industry and that have been traditionally subject to federal regulation. For each of these reasons, continued application of the federal regulation to these enterprises—now owned by the State rather than a private party—will not "endanger the States' 'separate and independent existence.'" And as in *UTU* "there is no justification for a rule which would allow the states, by acquiring functions previously performed by the private sector, to erode federal authority."

1. At the threshold, the service at issue in this case is remarkably similar to the service involved in *UTU*. In that case, "[b]y far the bulk" of the state-owned railroad's business was "carrying commuters between Long Island's suburban communities and their places of employment in New York City." 455 U.S. at 680 n.1. Here, of course, SAMTA performs a similar function—albeit using buses rather than trains—in the San Antonio metropolitan area; as SAMTA stated in its Motion to Affirm (at 7), "[i]t is estimated that at least two-thirds of all passengers riding SAMTA's regular-line service buses are travelling to or from school or their jobs." It would be surprising, indeed, if the Tenth Amendment draws a constitutional distinction between transporting commuters by bus as opposed to by train.

2. *UTU* recognizes that a state-owned commuter passenger railroad no less than any other railroad is a "business enterprise." 455 U.S. at 686-86. The same is true of all state-owned transit systems. Mass transit operates on a fee-for-service basis; those who cannot afford the fee cannot avail themselves of the service. This means of allocating useful goods and services is, of course, the very hallmark of the market system. This feature distinguishes state-owned mass transit systems from, *e.g.*, state-owned schools, police departments, or fire departments which are public precisely in that each is available to *all* members of the public without regard to economic means. Because mass transit services are sold by

the State rather than delivered—generally in competition with other means of transportation—public mass transit is, in essence, a business. *See Helvering v. Powers*, 293 U.S. 214, 227 (1934). And to repeat the words of *UTU*, "[i]t should be evident that the running of a business enterprise is not an integral operation in the area of traditional government functions." 455 U.S. at 685 n.11.

We recognize, of course, that transit systems are presently subsidized both by the federal government (*see* p. 20, *infra*) and also by the State governments; approximately 50% of operating costs are now paid by such subsidies.[8] But the railroad in *UTU* also was state-subsidized and yet was deemed by the Court to be a "business enterprise"; indeed the State had acquired that railroad only after "a period of steadily growing operating deficits," 455 U.S. at 680, and the record in *UTU* revealed that state subsidies accounted for 50% of the railroad's gross income, Joint Appendix in No. 80-1925 at 277-78. Furthermore, there are a host of purely private entities that are governmentally-subsidized to a greater or lesser degree (either through direct grants or tax exemptions) but that indisputably are business enterprises (farms provide perhaps the most prominent example). Thus, the existence of state (and federal) subsidies for mass transit cannot defeat the conclusion that this is a business and hence not an "integral operation in the area of traditional government functions."

3. As in *UTU*, the "historical reality" here, as the District Court found, "*is* not one of predominantely [*sic*] public ownership and operation of transit services." J.S.

---

[8] Feinsod Affidavit ¶ 7. This is a quite recent development: as of 1970 (by which time public transit was well established, *see* APTA, *1981 Transit Fact Book* at 43), revenues from fares covered 90% of operating costs. C. Krouse, "Existing Revenue Sources" *in* American Society of Civil Engineers, *Proceedings of the Speciality Conference on Urban Transportation Financing* at 48 (1979).

4a (emphasis in original). Rather, as appellee American Public Transit Association stated in its 1978-79 *Transit Fact Book* (at 55), "[p]ublic ownership of transit is a recent development." As of 1940, for example, it was almost as rare for a State to own a transit system such as SAMTA as a commuter railroad such as the Long Island; there were only 20 public transit systems in the entire nation (2% of such systems) and those systems accounted for only 7% of all transit vehicles. As late as 1960, state-owned transit systems still were the relatively infrequent exception rather than the rule; there were only 58 public systems (5% of the total) and those systems accounted for approximately 33% of all transit vehicles. APTA, 1981 *Transit Fact Book* at 43.[9]

In the past two decades, there has been a substantial trend towards state acquisition and ownership of mass transit systems (funded, in substantial part, by the federal government, *see* pp. 17-18, 20, *infra*); the number of publicly-owned systems increased from 58 in 1960, to 159 in 1970, to an estimated 576 in 1980. *Id.* These public systems now account for an estimated 90% of the transit vehicles. *Id.* But as in *UTU* this "recent development" (to quote again from appellee APTA's *Fact Book*) cannot "alter the historical reality": the operation

---

[9] Notwithstanding *UTU*'s emphasis on the tradition of private ownership in that case, the district court here minimized the significance of the tradition of privately-operated transit systems, emphasizing instead the history of state regulation of transit systems. J.S. 3a-5a. *UTU* cannot be so distinguished, for railroads also have long been subject to state regulation. *See, e.g., Chicago, R.I. & P.R. Co. v. Arkansas*, 219 U.S. 453 (1910) ("full crew" law); *Engineers v. Chicago, R.I. & P.R. Co.*, 382 U.S. 423 (1966) (same); *Smith v. Alabama*, 124 U.S. 465 (1887) (licensing engineers who operate trains within the state); *Nashville, Etc. Railway v. Alabama*, 128 U.S. 96 (1888) (requiring engineers to obtain a certificate of fitness with regard to color-blindness and visual powers); *N.Y., N.H. & H. Railroad v. New York*, 165 U.S. 628 (1896) (regulating the heating systems of passenger cars).

of buses "is not among the functions *traditionally* performed by state and local governments." *UTU*, 455 U.S. at 686.

4. As in *UTU*, the States entered the mass transit field in a substantial way "with full awareness that it was subject to federal regulation" and the States have "operated under federal regulation for . . . years without claiming any impairment of [their] traditional sovereignty." 455 U.S. at 690. The federal regulation of transit systems at the time the States entered this field in large numbers took two discrete forms.

First, in 1964 Congress enacted the Urban Mass Transit Act, 49 U.S.C. §§ 1601 *et seq.* ("UMTA"), which "was designed in part to provide federal aid for local governments in acquiring failing private transit companies." *Jackson Transit Authority v. Transit Union*, 457 U.S. 15, 17 (1982). In enacting that law Congress decided to "protect[] workers affected as a result of adjustments in an industry carried out under the aegis of Federal law." H.R. Rep. No. 204, 88th Cong., 1st Sess. 15 (1963); S. Rep. No. 82, 86th Cong., 1st Sess. 12 (1963). Consequently, § 10(c) of UMTA as originally enacted—now § 13(c), 49 U.S.C. § 1609(c)—imposes certain requirements on UMTA grantees with respect to their employment relationship with transit employees.

In particular, § 13(c) provides that a State that receives UMTA assistance and acquires a transit system, must "protect[] individual employees against a worsening of their position with respect to their employment," and must "continu[e] collective bargaining rights" (even though the National Labor Relations Act as amended, 29 U.S.C. §§ 151 *et seq.*, does not apply to state employees). To this extent § 13(c) requires UMTA grantees, as a matter of federal law, to "accommodate state law to collective bargaining," *Jackson Transit Authority*, *supra*, 457 U.S. at 28, and thus to surrender what would otherwise be their unlimited managerial authority to fix the

terms and conditions of employment for transit employees.[10]

With rare exception, the States have elected to accept UMTA funds and to abide by these federal requirements. As of March, 1982, the Urban Mass Transit Administration had made a total of 2,547 capital grants; at least 382 cities and numerous rural areas—located in every State—have received UMTA funds.[11] Simply stated the States chose to enter the transit field with federal assistance, knowing that in so doing they would be subject to federally-imposed requirements.

In addition to UMTA's requirements, in 1966 Congress amended the FLSA, P.L. 89-601, so as to eliminate the "distinction between a public or private local transit

---

[10] To be sure, as this Court held in *Jackson Transit Authority, supra*, § 13(c) does not "create a body of federal law applicable to labor relations between local governmental entities and transit workers" and § 13(c) does not "supersede state law." 457 U.S. at 27. But *Jackson Transit* makes clear that—as explained in text—there are federal obligations imposed by § 13(c) and that there are a variety of means of enforcing § 13(c)'s requirements against UMTA grantees. *See id.* at 29 n.15; *cf. Bell v. New Jersey*, —— U.S. ——, 51 L.W. 4647 (May 31, 1983).

[11] *See Hearings Before the Subcommittee on the Department of Transportation and Related Agencies Appropriations of the House Committee on Appropriations*, 97th Cong., 2d Sess. at 818-20; American Ass'n of State Highway and Transportation Officials, *Survey of State Involvement in Public Transportation* at 32-33 (1982). UMTA funds have been used by transit authorities to purchase 48,891 buses and 4,245 rapid rail transit cars and have been used to construct 311 miles of rapid rail transit track. *Hearings, supra.*

Although we have not been able to find any current data on the number of cities or States that have used UMTA funds to acquire a private mass transit company, as of the end of fiscal year 1975 a total of 115 cities had done so. Department of Transportation, *UMTA Statistical Profile* at Table 10 (1976). Furthermore, "[i]n a number of cities more than one transit property was acquired" with UMTA funding and thus the number of systems so acquired as of 1976 was "considerably higher." *Id.*

system," and provide that "all the employees of a public local transit system which qualifies as an enterprise engaged in commerce [are] covered by the minimum wage . . . provisions of the act." S. Rep. No. 1487, 89th Cong., 2d Sess. at 26-27 (1966). Thus, any State that acquired a transit system after 1966—and over 80% of public transit systems become public after 1966, *see* 1981 *APTA Transit Fact Book* at 43—did so knowing that Congress had manifested its intention to regulate the employment relationship between public transit systems and their employees, and specifically that Congress had made the minimum wage provisions of the FLSA applicable to such systems.

In sum, as in *UTU*, the States "knew of and accepted the federal regulation" in acquiring mass transit systems and have "operated under" that regulation for years. "It can thus hardly be maintained that application of the [FLSA] to the State's operation of [a transit system] is likely to impair the State's ability to fulfill its role in the Union or to endanger the [State's] 'separate and independent existence.' " 455 U.S. at 690.

5. Finally, the ultimate point made in *UTU* is equally applicable here: "there is no justification for a rule which would allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in areas traditionally subject to federal statutory regulation." 455 U.S. at 687. Until the States entered the mass transit field, the labor relations of transit companies were governed by the National Labor Relations Act; indeed, in *Bus Employees v. Wisconsin Board*, 340 U.S. 383 (1951), this Court specifically upheld the applicability of that Act to mass transit companies. *See also Bus Employees v. Missouri*, 374 U.S. 74 (1962). To hold that State acquisition of transit company ends not only NLRA regulation (because the NLRA, by its terms, does not apply to the States) but also eliminates the federal power to regulate in any respect the employment

relations of such companies would, as previously explained, create an impetus towards state acquisition of private enterprises—an impetus that cannot be attributed to the Tenth Amendment's framers.

There is one additional factor here that makes it especially inappropriate to allow the States' entry into the transit field to defeat federal regulatory authority: the role the federal government has played in promoting that entry. As previously stated, mass transit systems generally were owned and operated by private parties as of 1960 (p. 16, *supra*). In 1964, Congress enacted UMTA and made federal money available for, *inter alia*, state acquisition of private transit companies or state development of transit operations. As the Third Circuit wrote in *Kramer v. New Castle Transit Authority*, 677 F.2d 308 (C.A. 3 1982), *cert. denied*, —— U.S. ——, 51 L.W. 3533 (Jan. 17, 1983):

> The UMTA put inexorable forces in motion whereby, at an accelerated pace, transportation companies changed hands from the private sector to the public sector. . . . The federal government is actively involved in local mass transportation. It provides: (1) capital grants, funded on a "80% federal/20% local" matching basis, (2) operating grants, on a "50% federal/50% local" matching basis; and (3) technical assistance to state and local planning agencies on an "80% federal/20% local" matching basis. [*Id.* at 309-310]

Through UMTA, over $18,000,000,000 in federal money has been funneled to the States for mass transit. *Hearings, supra* n.11, at 818.

The *Kramer* court drew the following lesson:

> [*UMTA's*] *result has been a network of publicly run systems which are cooperations between the federal government and the states.* The tradition that has evolved encompasses not only state involvement in local mass transportation but also an important

> federal role in the matter. The Authority cannot recast this development as one is which the states took over transit services on their own while the federal government only provided *post hoc* financial assistance. . . . There is . . . no tradition of the states *qua* states providing mass transportation. Moreover, since it is undisputed that the national government can set the employment relations in the area of mass transit, it would be unjustified to allow the states, by acquiring functions previously performed by the private sector, to erode federal au-authority in this area. [677 F.2d at 310, emphasis added, footnote omitted.]

Two other courts of appeals have unanimously agreed with the Third Circuit's reasoning and conclusion. In *Alewine v. City Council*, 699 F.2d 1060, 1069 (C.A. 11 1983) much of the foregoing passage was quoted with approval. And in *Dove v. Chattanooga Area Reg. Transp. Auth.*, 701 F.2d 50 (C.A. 6 1983), the court observed:

> In this case, a traditionally private service has become predominantly a public service due to federal aid. *Kramer*, 677 F.2d at 309-10. In such a case, the concerns stated in *National League of Cities* are not implicated. *It would indeed be peculiar to hold that federal aid for transit created a situation where a state which provides transit service is immune from federal labor regulations.* [701 F.2d at 53, emphasis added] [12]

---

[12] In *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465 (C.A. 9 1983), the Ninth Circuit followed similar reasoning to conclude that the Tenth Amendment does not bar application of the FLSA to state-employed "chore workers" who were paid through a federal-state program to perform for aged and disabled individuals a wide variety of domestic tasks which "have been traditionally performed by domestic employees in the private sector," *id.* at 1472. That court concluded:

> A program that is set up at the behest of the federal government, and that continues to be regulated and funded in large part by the federal government, is unlikely to be a function

D. The parallels between *UTU* and this case are, we believe, sufficient to demonstrate that the result in both cases must be the same. But we venture a few words more on why the constitutional values at stake require that result.

The fundamental premise—the constitutional value—on which *National League of Cities* and its progeny rest is that "'[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.'" 426 U.S. at 844, *quoting Texas v. White*, 7 Wall. 700, 725 (1869). The conclusion drawn from that premise is that "our federal system of government imposes definite limits on the authority of Congress to regulate the activities of the States as States," 426 U.S. at 842, in order to protect "the States' 'separate and independent existence,'" 426 U.S. at 851, *quoting Coyle v. Oklahoma*, 221 U.S. 559, 580 (1911). As the Court stated just last Term, "the imposition of certain federal regulations on state governments might, if left unchecked 'allow "the National Government [to] devour the essentials of state sovereignty."'" *EEOC v. Wyoming*, *supra*, 51 L.W. at 4222.

It is equally true, however, that "the Constitution, in all its provisions, looks to an indestructible *Union*" based on a federal government whose laws, enacted pursuant to such grants of authority as the Commerce Clause, are by the force of the Supremacy Clause "the supreme Law of the Land." Consequently, any Tenth Amendment "check" on federal authority necessarily "devour[es]" a part of the federal government's sovereignty. *National League of Cities*, *Hodel*, and *UTU* resolve this tension by limiting

---

integral to the state's "separate and independent existence." Such a program is, in fact, a joint federal and state undertaking. It is unlike such functions as police protection, control over which is essential to a state's status as an independent government unit. Federal regulation of the chore worker program through the Commerce Clause poses no significant threat to state sovereignty. [*Id.*]

federal authority *only* to the extent necessary to preserve "the essentials of state sovereignty."

There is, we submit, only one area of state action that is clearly an "essential[] of state sovereignty"—state law-making and law-enforcement. "[H]aving the power to make decisions and to set policy is what gives the State its sovereign nature." *FERC v. Mississippi*, *supra*, 456 U.S. at 761. "It would follow that the ability of a state legislative (or . . . administrative) body—which makes decisions and sets policy for the State as a whole—to consider and promulgate regulations of its choosing must be central to a State's role in the federal system." *Id.* Thus, a federal law that "commandeers the legislative processes of the States by directly compelling them to enact and enforce a regulatory program," *Hodel*, *supra*, 452 U.S. at 288, *quoted in FERC v. Mississippi*, *supra*, 456 U.S. at 764-65, is perhaps the clearest example of federal action interdicted by the *National League of Cities* rule.

Law-making and law-enforcement are unique in that the people have granted the government, as their representative, the *exclusive authority* to engage in those activities for the polity as a whole. Government provision of goods and services stands on a very different footing. Neither political theory nor actual practice provides a certain guide as to whether a particular good or service should be or will be provided in whole or in part by the government. Rather, it appears that state provision of a service is more often the product of economic forces that vary from place to place and from time to time than an assertion by the States of their role as sovereigns in the Union.

The precipitous decline of private mass transit and rise of public mass transit makes the point well. These developments do not appear to represent a new understanding of state sovereignty but rather the attraction of relatively low-cost, efficient automobile transportation

(operating on roads constructed and maintained by the government) during relatively affluent times—an attraction that has undermined the competitive position of mass transit in the *current* marketplace. But in a dynamic economy that attraction could well be transient and if so the private sector may again view mass transit as a sound investment. There is, therefore, no reason to believe that the current balance between public and private mass transit will continue of its own force or should to any extent be maintained by an artificial cost advantage accorded to public mass transit.[13]

Similar market forces may at any time lead the States to take on a larger role in the provision or distribution of food, gas, electricity or other necessities of modern life, or a smaller role in providing services that are now "public." So long as the dictates of the Taking Clause are observed we know of nothing in the Constitution that prevents a State from moving as far along the road to democratic socialism in its best sense as the people of that State determine to go. But because economic considerations have so heavy a weight in such determinations, it is, we submit, appropriate to approach with great skepticism any claim that state sovereignty will be compromised if a state-provided service were subject to federal regulation pursuant to the Commerce Clause

---

[13] Mass transit ridership historically has been quite cyclical. In 1926, for example—following a period of sustained growth—mass transit ridership reached 17,201,000,000. Over the next decade, ridership declined by over 25%, bottoming out at 12,645,000,000 in 1938. During the depression and World War II ridership almost doubled, reaching a peak of 23,372,000,000 in 1946. Over the ensuing twenty-five years ridership again declined, this time by almost 70%, falling to 6,972,000,000 in 1975. But in 1975 ridership began to increase again, and as of 1980 was estimated at 8,228,000,000, an increase of over 15% in only five years. *See* U.S. Dept. of Commerce, *Historical Statistics of the United States From Colonial Times to 1970*, Series Q 235-250 (1976); U.S. Dept. of Commerce, *Statistical Abstract of the United States, 1982-1983* at 623.

whose very purpose is to provide for uniform national regulation of economic activity. And surely, where, as in *UTU* or as in this case, an activity has traditionally been regarded as a business, has traditionally been performed predominantly by private enterprise, and has traditionally been regulated by the federal government, that activity—when undertaken by a State—is not an "essential[] of state sovereignty" and is not one to which federal sovereignty must yield.

CONCLUSION

For the above stated reasons the decision below should be reversed.

Respectfully submitted,

EARLE PUTNAM
5025 Wisconsin Ave., N.W.
Washington, D.C. 20016

LINDA R. HIRSHMAN
201 N. Wells Street
Chicago, Illinois 60606

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20036
(202) 637-5390
Counsel of Record

Of Counsel:

DAVID M. SILBERMAN
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037

APPENDIX

1. The Constitution of the United States provides in pertinent part:

Article I, Section 8:

> The Congress shall have power
>
> * * * * *
>
> To regulate Commerce . . . among the several States . . .;
>
> * * * * *
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article VI, cl. 2:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . .

Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

2. The Fair Labor Standards Act of 1938, 29 U.S.C. (& Supp. III) 201 *et seq.*, provides in pertinent part:

29 U.S.C. (& Supp. III) 203:

> As used in this chapter—
>
> * * * * *
>
> (d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor

organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

* * * * *

(r) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose. * * * For the purposes of this subsection, the activities performed by any person or persons—

* * * * *

(2) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), or

(3) in connection with the activities of a public agency,

shall be deemed to be activities performed for a business purpose.

* * * * *

(s) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person, and which—

* * * * *

(6) is an activity of a public agency.

* * * * *

The employees of an enterprise which is a public agency shall for purposes of this subsection be deemed to be employees engaged in commerce,

or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce.

29 U.S.C. (Supp. III) 206(a):

Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) not less than $2.65 an hour during the year beginning January 1, 1978, not less than $2.90 an hour during the year beginning January 1, 1979, not less than $3.10 an hour during the year beginning January 1, 1980, and not less than $3.35 an hour after December 31, 1980, except as otherwise provided in this section;

29 U.S.C. 207(a):

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.